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**Kewangan Bersatu Bhd
(formerly known as Kewangan Usaha Bersatu Bhd) v
Sidax Latex Industries Sdn Bhd**

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02-304 OF
2001
DENIS ONG, TENGKU BAHARUDIN SHAH AND ZULKEFLI JJCA
26 OCTOBER 2005

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Civil Procedure — Summary judgment — Triable issues — Whether triable issues proved

Hire Purchase — Breach of agreement — Claim against guarantors — Whether guarantors estopped from raising issue of no notice of termination — Whether correct balance owing stated in statement of balance — Application of conclusive evidence clause

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The first respondent had entered into seven hire purchase agreements ('the HP agreements') to hire various machines with the appellant, a licensed finance company. The second to fifth respondents were the joint and several guarantors to the HP agreements. The appellant alleged that the first respondent failed to pay their debt and the appellant applied for summary judgment against them in the High Court. The learned judge in his grounds of judgment in dismissing the appellant's application had found that there were triable issues which merit a full trial as follows: (1) the account number of the HP agreements as stated in the statement of balance in exh RK-3 were different; (2) no evidence that the sum of RM10,000 being the sales proceeds of the machines under the HP agreements was taken into account; and (3) no notice of termination pursuant to cl 10 of the HP agreements were issued. The appellant appealed.

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Held, allowing the appeal:

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(1) The second, third, fourth and fifth respondents had consented to the sale of the repossessed machines for RM10,000 and had subsequently proposed settlement of the balance outstanding sum. Therefore by their conduct the respondents were estopped from raising the issue that no notice of termination pursuant to cl 10 of the respective HP agreements were issued (see para 4).

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(2) The correct account numbers of the respective HP agreements were stated in the statement of claim. In the statement of balance in exh RK-3 for the respective HP agreement, the error in account number was corrected by a further affidavit by the appellant (see para 5). A mere typographical error which had been corrected by affidavit evidence cannot amount to a triable issue (see para 6).

(3) The appellant in fact had taken into account the sum of RM10,000 (see para 7). The first respondent had also not disputed the computation of the accounts of the appellant in respect of the present claim whereby judgment in

default of appearance had been entered against the first respondent. It would follow that the second to the fifth respondents cannot arbitrarily dispute the accounts of the appellant as the conclusive evidence clause stated in cl 2 of the respective letter of guarantees would apply (see para 9).

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- (4) Therefore the alleged issue that the RM10,000 was not taken into account was not a triable issue. Even assuming the sum of RM1,000 was an issue to be tried, the court could still enter the judgment for the sum claimed less the amount of RM10,000 (see para 10).

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[Bahasa Malaysia summary]

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Responden pertama telah memasuki tujuh perjanjian sewa beli ('perjanjian SB') untuk menyewa pelbagai mesin dengan perayu, syarikat kewangan berlesen. Responden-responden kedua hingga ketujuh merupakan penjamin bersama dan berasingan kepada perjanjian SB tersebut. Perayu mendakwa responden pertama telah gagal membayar hutangnya dan perayu telah memohon penghakiman terus terhadapnya di Mahkamah Tinggi. Hakim bijaksana dalam alasannya semasa menolak permohonan perayu mendapati bahawa terdapat persoalan yang perlu dibicarakan yang mana memeritkan satu perbicaraan penuh seperti berikut: (1) nombor akaun perjanjian SB sepertimana dinyatakan dalam penyata baki dalam eksh RK-3 adalah berbeza; (2) tiada keterangan bahawa jumlah RM10,000 adalah hasil jualan mesin di bawah perjanjian SB yang diambil kira; dan (3) tiada notis pembatalan menurut kl 10 perjanjian SB telah dikeluarkan. Perayu telah merayu.]

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Diputuskan, membenarkan rayuan tersebut:

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- (1) Responden-responden kedua, ketiga, keempat dan kelima telah bersetuju dengan jualan mesin-mesin yang diambil semula untuk RM10,000 dan berikutan itu telah mencadangkan penyelesaian jumlah baki yang tertunggak. Oleh itu melalui perlakuan mereka responden-responden diestopkan daripada menimbulkan persoalan bahawa tiada notis penamatan telah dikeluarkan menurut kl 10 perjanjian SB masing-masingnya (lihat perenggan 4).
- (2) Nombor akaun yang betul perjanjian SB masing-masingnya dinyatakan dalam pernyataan tuntutan. Dalam penyata baki dalam eksh RK-3 untuk perjanjian DB masing-masingnya, kesilapan pada nombor akaun telahpun diperbetulkan dalam affidavit seterusnya oleh perayu (lihat perenggan 5). Kesilapan semasa menaip semata-mata yang telah diperbetulkan oleh keterangan affidavit tidak membentuk suatu persoalan yang perlu dibicarakan (lihat perenggan 6).
- (3) Bahkan perayu telah mengambilkira jumlah RM10,000 (lihat perenggan 7). Responden pertama juga tidak mempertikaikan pengiraan akaun perayu berhubung tuntutan semasa di mana penghakiman ingkar kehadiran telah dimasukkan terhadap responden pertama. Oleh demikian responden-responden kedua hingga kelima tidak boleh sewenang-wenangnya mempertikaikan akaun perayu kerana klausa keterangan konklusif yang dinyatakan dalam kl 2 surat jaminan akan terpakai (lihat perenggan 9).

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- A** (4) Oleh itu persoalan yang dikatakan bahawa RM10,000 tidak diambil kira bukan suatu persoalan yang perlu dibicarakan. Jikapun dengan menganggap RM10,000 adalah suatu persoalan yang perlu dibicarakan, mahkamah masih akan memasuki penghakiman bagi jumlah yang dituntut kurang daripada jumlah RM10,000 (lihat perenggan 10).

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Notes

For a case on a claim against guarantors, see 7(2) *Mallal's Digest* (4th Ed, 2003 Reissue) para 3593.

- C** For cases on triable issues, see 2(2) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 3170–3243.

Cases referred to

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331 (refd)

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Legislation referred to

Rules of the High Court 1980 O 14 r 1

- E** **Appeal from:** Suit No D5–22–853 of 1999 (High Court, Kuala Lumpur)

B Thangaraj (Thangaraj & Associates) for the appellant.
Daya Nair (Nik Saghir & Ismail) for the respondent.

Zulkefli JCA (delivering judgment of the court):

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[1] This is an appeal by the appellant ('the plaintiff in the court below') against the decision of the learned judge of the High Court dismissing the plaintiffs application for summary judgment under O 14 r 1 of the Rules of the High Court 1980 against the second, third, fourth and fifth respondents ('second, third, fourth and fifth defendants in the court below'). Judgment in default of appearance had been entered against the first respondent ('the first defendant in the court below') and the present appeal is directed only against the second to the fifth respondents.

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[2] The relevant facts relating to the plaintiff's claim are as follows:

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- (1) The first respondent had entered into seven hire purchase agreements ('the HP agreements') to hire various machines with the appellant. The appellant is a licensed finance company.

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- (2) The second to fifth respondents are the joint and several guarantors to the HP agreements. The second to fifth respondents as guarantors had signed seven letter of guarantees in relation to the HP agreements.

- (3) The appellant alleged that the first respondent had breached the HP agreements and because of the breach the appellant had suffered damages and losses.

- (4) Despite notices of demand being sent to all the respondents, the respondents still failed/refused to pay their debt and the appellant took this action against them in the High Court claiming for, inter alia:
- (i) RM1,372,270.10;
 - (ii) Interest at the rate of 18%pa on RM934,608.70 to be calculated from 16 December 1998 till full realization;
 - (iii) Interest at the rate of 18%pa on RM368,413.28 to be calculated from 16 December 1998 till full realization;
 - (iv) Interest at the rate of 18%pa on RM69,248.12 to be calculated from 16 December 1998 till full realization;
 - (v) costs of this action;
 - (vi) other relief.
- [3] The learned judge in his grounds of judgment in dismissing the plaintiff's application had found that there are triable issues which merit a full trial as follows:
- (a) The account number of the HP agreements as stated in the statement of balance in exh RK-3 are different.
 - (b) No evidence that the sum of RM10,000 being the sales proceeds of the machines under the HP agreements was taken into account.
 - (c) No notice of termination pursuant to cl 10 of the HP agreements were issued.
- [4] On the third triable issue as found by the learned judge, the learned counsel for the respondents before us in this appeal conceded that there was in fact a notice of termination issued pursuant to cl 10 of the HP agreements. On this issue, we would add by stating that the second, third, fourth and fifth respondents had consented to the sale of the repossessed machines for RM10,000 and had subsequently proposed settlement of the balance outstanding sum (see pp 209–214 of appeal record). Therefore by their conduct, the respondents are estopped from raising the issue that no notice of termination pursuant to cl 10 of the respective HP agreements were issued (see the case of *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331).
- [5] On the first triable issue as found by the learned judge, we find it is not a disputed fact that the correct account numbers of the respective HP agreements are stated in the statement of claim. (see pp 21–23 of the appeal record). It is noted that in the statement of balance in exh RK-3 for the respective HP agreement, the account number had been wrongly stated whereby instead of the number '91' it was wrongly stated as '95'. However, we find the error in the account number in exh RK-3 was corrected by a further affidavit by the appellant and at para 4 of the further affidavit it is stated as follows:
4. Bagi menjawab perenggan 7, 8 dan 9 affidavit defendan, saya akan menyatakan bahawa wujud kesilapan menaip di dalam nombor akaun yang dinyatakan di dalam kesemua

- A** penyata akaun yang dikepil dan ditanda sebagai eksh RK-3 di dalam affidavit plaintif. Nombor-nombor akaun yang sebenarnya bagi setiap penyata akaun di dalam eksh RK-3 adalah seperti berikut:

Nombor Akaun Di Dalam Penyata Akaun Nombor Akaun Sebenarnya

- B** (a) PJ/HP/95/1212 — PJ/HP/91/1212
(b) PJ/HP/95/1213 — PJ/HP/91/J213
(c) PJ/HP/95/1223 — PJ/HP/91/1223
(d) PJ/HP/95/1224 — PJ/HP/91/1224
(e) PJ/HP/95/1229 — PJ/HP/91/1229
C (f) PJ/HP/95/1230 — PJ/HP/91/1230
(g) PJ/HP/95/1231 — PJ/HP/91/1231

Selain daripada nombor '95' yang sepatutnya dinaytakan sebagai '91' di dalam kesemua penyata akaun di dalam eksh RK-3 tidak ada sebarang kesilapan di dalam penyata akaun di dalam eksh RK-3. Penyata akaun di dalam eksh RK-3 adalah bagi perjanjian sewa belt dan surat jaminan yang dikepil dan ditanda sebagai eksh RK-1 dan RK-2, masing-masing yang dikepil kepada affidavit plaintif.

(see pp 58–59 of appeal record)

- E** [6] It is our view a mere typographical error which had been corrected by affidavit evidence cannot amount to a triable issue.

[7] On the second triable issue as found by the learned judge, it is our finding that the appellant in fact had taken into account the sum of RM10,000 and this fact had been stated in para 7 of the further affidavit:

- F** 7 Peralatan sewa beli berkenaan tidak dapat dijual dan dengan persetujuan defendan kedua, ketiga dan kelima, kesemua peralatan sewa beli berkenaan telah dijual dengan harga RM10,000 dan telah diambil kira sebagai item 'Payment Received' di dalam penyata akaun bagi Perjanjian Sewa Beli PJ/HP/91/1212 yang dikepil dan ditanda sebagai eksh RK-3 kepada affidavit plaintif. salinan surat defendan kedua, ketiga dan kelima dan surat daripada
G World Biz Trade Company (M) Sdn Bhd adalah dikepil dan ditanda sebagai eksh 'RK-9'.

(see p 60 of the appeal record)

[8] It would also be evident from the following statement of account that the appellant had taken into account the said RM10,000 as follows:

- H** (a) The first respondent in its calculation of the outstanding sum in respect of Account No 1212 had stated that the instalment paid is RM182,740.
(see p 202 of the appeal record)
(b) The appellant in its statement of balance in respect of Account No 1212 had
I stated that the payment received in respect of the instalment is RM192,740.
(see p 153 of appeal record)

[9] We further find that the first respondent had also not disputed the computation of the accounts of the appellant in respect of the present claim whereby judgment in

default of appearance had been entered against the first respondent. It would follow that the second to the fifth respondents cannot arbitrarily dispute the accounts of the appellant as the conclusive evidence clause stated in cl 2 of the respective letter of guarantees would apply. Clause 2 states as follows:

2 An acknowledgement in writing by the hirer of the Hirer's indebtedness under the said hire purchase agreement (whether such acknowledgement be express or implied) shall be conclusive evidence of such indebtedness against me/us and any judgment or order obtained against the hirer shall be binding on me/us and I/we shall be precluded from disputing the hirer's liability as determined by the said judgment or order.

[10] We therefore find the alleged issue that the said RM10,000 is not taken into account is not a triable issue. We would like to state here even assuming the said sum of RM10,000 is an issue to be tried, the court can still enter the judgment for the sum claimed less the amount of RM10,000.

[11] For the above stated reasons, we allowed this appeal and made the orders as prayed for by the appellant in the statement of claim. The respondents were ordered to pay the costs of the appeal. The deposit is to be refunded to the appellant.

Appeal allowed.

Reported by Loo Lai Mee

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